Supreme Court, U.S.
F I L E D

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ACCREDITED SURETY AND
CASUALTY COMPANY, INC.,

Petitioner,

v.

WAYNE McELVEEN,
SHERIFF OF CALCASIEU PARISH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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QUESTIONS PRESENTED FOR REVIEW

1. Does a sheriff's refusal to accept a bail bond from a licensed commercial surety company constitute a violation of 42 USC 1983?

2. If so, what is the scope of the sheriff's liability for damages?

PARTIES TO THE PROCEEDING

The parties remaining in this case with respect to the judgment of the Supreme Court of the State of Louisiana are: (1) Accredited Surety & Casualty Company, Inc.,* the underwriter of the bail bonds in question and Petitioner herein and (2) Wayne F. McElveen, the Sheriff of Calcasieu Parish, Louisiana.

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*Accredited Surety & Casualty Company, Inc. has no parent or subsidiary companies.

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PRIOR REPORTS OF OPINIONS

Accredited Surety and Casualty Company, Inc. v. Wayne McElveen, 631 So.2d 563 (La. App. 3 Cir. 1994), *writ denied* 637 So.2d 483 (La. 1994).

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ACCREDITED SURETY AND
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WAYNE McELVEEN,
SHERIFF OF CALCASIEU PARISH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

JURISDICTION

This case arises out of a civil damage suit filed in state court by Accredited Surety & Casualty Company, Inc. ("Accredited") against the Sheriff of Calcasieu Parish (the "Sheriff") for his refusal to accept its commercial bail bonds which resulted in the loss of $33,000.00 in bond premiums to Accredited. Accredited's suit was based on both state and federal law grounds.

Accredited asserted claims under 42 USC 1983 and 1988, which were denied by the trial and intermediate appellate court. The Louisiana Supreme Court denied Accredited's application for a writ of certiorari on May 20, 1994.

Accredited's writ application to this Court is based on 28 USC 1257 seeking a review of the Louisiana Supreme Court's decree allowing the dismissal of Accredited's actions brought under 42 USC 1983 and 1988.

APPLICABLE LAWS

42 USC 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 USC 1988

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of

the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

1. Facts

At the time the facts of this case arose Accredited was (and still is) a Florida corporation licensed by the Louisiana Commissioner of Insurance as a fidelity and surety company authorized to underwrite bail (or "appearance") bonds in Louisiana.

Over the weekend of November 19, 1988, Accredited received $50,000.00 in cash as an advance payment of the premium on a bail bond which it had agreed to underwrite for Anthony Brown, who was being held in the Calcasieu Parish jail on six drug related charges for which a lump-sum bail had been set at $500,000.00. Posting of

the bond was deferred, however, until after the bond reduction hearing set in Brown's case for the coming Tuesday.

At that hearing, the State made an oral motion to "test the sufficiency of the surety" under article 321(B) of the Louisiana Code of Criminal Procedure in order to prevent Accredited from posting Brown's bond. The motion was denied for failure of the State to give Accredited proper notice and Brown's bail was reduced to $330,000.00 which was segregated into five individual amounts, in lieu of the original lump-sum bail.

Immediately following the bond reduction hearing, Accredited's representative (Steve Gennuso) and the local bonding agent (Sheral LaVergne) went to the Calcasieu Parish jail to pick up the bail bond forms provided and used by the Sheriff. They took the signed forms and Accredited's executed powers of attorney to the Sheriff's office for processing. The deputy at the desk referred Gennuso and LaVergne to Chief Criminal Deputy Spees, who advised them that he did not have the authority to approve bonds in the amounts presented and that only the Sheriff had such authority, but that the Sheriff wasn't available to handle the matter.

Spees gave Gennuso and LaVergne no further information or assistance, so Gennuso, himself, tried unsuccessfully to contact the Sheriff several times that afternoon and again the next morning. Finally, Gennuso received a call from a deputy who said that the Sheriff would see him that afternoon.

Gennuso went to the Sheriff's office after lunch and, after having to wait in the hall for at least two hours, he was called into the Sheriff's office. After conferring with Chief Civil Deputy Hodgkins, who had

testified on behalf of the State on its motion to prevent Accredited from posting Brown's bonds, the Sheriff, without any explanation, told Gennuso that he would not accept Accredited's bonds. The Sheriff then took Gennuso to Judge Lyons's office where the judge signed and handed Gennuso a temporary restraining order prohibiting Accredited from posting any bail bonds in Calcasieu Parish until its outstanding bond forfeiture judgments were paid. The district attorney's petition seeking the injunctive relief was verified by the Sheriff, himself, that same day.

The TRO was issued on Wednesday afternoon after the clerk's office had closed until Monday for the Thanksgiving holidays. Because Accredited could do nothing more to secure Brown's release for at least another four days, the original $50,000.00 premium was returned.

On the following Tuesday, Accredited paid the bond forfeiture judgments on which the TRO was based under protest and ultimately had the bond forfeiture judgments declared nullities and the payments returned with interest. Also on Tuesday Brown's bonds were posted by one of Accredited's competitors.

2. Federal Claims Presented

In its petitions Accredited alleged that the Sheriff's refusal to accept its bonds was committed in violation of Louisiana law and 42 USC 1983, in conjunction with which Accredited asserted a claim for attorney's fees under 42 USC 1988. The following is a representative sample of the allegations contained in Accredited's petitions:[1]

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[1]The ensuing paragraphs are quoted from Accredited's original Petition. Since this is an excerpt, the paragraphs are presented

[footnote continued]

33.

The Sheriff for the Parish of Calcasieu is not authorized to regulate the insurance industry for the State of Louisiana.

35.

The Sheriff's actions in denying Accredited to engage in a legal business opportunity were in violations of the duties incumbent upon Sheriffs in the State of Louisiana and the actions were in misfeasance, malfeasance and non feasance of his duties as Sheriff.

36.

The Sheriff's actions were directly designed and did in fact tortiously interfere with Accredited's rights to enter into a contract with the State of Louisiana and Anthony Brown.

38.

The ability to engage in business is a property right and a liberty interest secured by the Constitution of the State of Louisiana and by the Constitution of the United States.

39.

The aforementioned denial of the ability of Accredited to engage in the business of writing bail bonds of Accredited without a hearing represented a denial of procedural due process guaranteed to Accredited by the Fifth And Fourteenth Amendments to the U.S. Constitution and [by] the Louisiana Constitution.

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out of chronological order to insure a logical legal development of the theories pleaded.

59.

Pursuant to 42 U.S.C.A., Section 1983, the plaintiffs [*sic*] are entitled to damages for the following reasons.

60.

The Sheriff was acting in his official capacity under color of State law.

40.

As a result of the unconstitutional denial of plaintiff's ability to engage in business, plaintiff has suffered a loss of business income.

65.

Due to the Sheriff's deprivation of the plaintiff's Constitutional Rights, while acting under color of state law and in his official capacity, plaintiff is entitled to reasonable attorneys fees pursuant to 42 U.S.C.A. 1988 for the prosecution of this claim.

The case was tried before the district court judge who denied Accredited's federal law claims while holding the Sheriff liable "in his official capacity" for the $33,000.00 in premiums under state tort law.[2]

Mr. BOOK: Your Honor, at this time, Sheriff McElveen and the Sheriff's Department, the defendants in this matter, would move for a directed verdict as to the suit against him, personally, and as to the 1983 matter, without going into great detail about the factual –

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[2]The trial court's rulings were all oral. Accredited's federal law claims were dismissed and the Sheriff was released from personal liability on the Sheriff's motions for directed verdict. The court's rulings are contained in the excerpt of the trial transcript found in the Appendix at p. 16a.

The COURT: I don't think you need to. I think you're right. Gentlemen, I'm inclined to grant the defendant's request for a directed verdict as to the Sheriff, individually. It is the Court's opinion that the Sheriff was in his official capacity. There is absolutely no evidence as to the 1983 violations; however, there is evidence as to the tortious conduct, if any. So, I'm inclined to grant that, but I'll hear your arguments if you have any.

. . . .

Mr. RUNG: Your Honor, our argument as far as the 1983 claim for the record, it's that we feel like that we have shown that there is intentional misconduct in this case. Particularly in light, that there's been admission that there was a writ of mandamus filed earlier against the Sheriff, and that he knew, and was aware, and apprised that he had no authority to refuse to accept the bond by a lawfully licensed surety company and by a lawfully licensed agent acting on their behalf. That action certainly shows that the Sheriff intentionally took this action and it certainly has been a violation of a Constitutional right on behalf of Accredited because they have the right to do business, and that is if a state agency or a state authority or a state actor deprives a person of their Constitutional right to do business, that actor has violated the Constitutional right, and it's as you say, if he was acting within his official capacity, then, he's under the power of state law, and that meets the second requirement of the 1983 claim.

THE COURT: I am extremely familiar with 1983 claims because I was one of the few lawyers in this parish who ever filed any; so, it's nothing new. I'm going to grant the directed verdict as to the Sheriff, individually, and as to the 1983 claims themselves.

The Sheriff appealed the judgment and Accredited answered, reasserting its claims under 42 USC 1983 and 1988, as well as reurging the Sheriff's individual liability. The appellate court affirmed the trial court's denial of the federal actions and reversed the trial court's holding of liability under state tort law.

> Although it may be that the suit for injunction was instituted by the District Attorney as a result of repeated requests by Sheriff McElveen for assistance in the collection of judgments ordering bond forfeitures and/or because of past experience, the Sheriff doubted that a bail bond issued by Accredited constituted sufficient security, the fact remains that the proceedings were instituted by the District Attorney and the TRO was issued by the Judge having jurisdiction over the offense charged, all strictly in accordance with La. C.Cr. P. art. 321. Sheriff McElveen had no authority to either institute or prosecute a proceeding under La. C.Cr.P. art. 321 and under the circumstances, did not act "under color of state law" to deprive Accredited of any of its rights, privileges etc. secured by the Constitution. In sum, appellee has failed to show that it has been deprived of due process or equal protection of the law. . . .
>
> . . . The present defendant, Sheriff McElveen, was not the plaintiff in the original suit, the district attorney was. While it is true, as plaintiff states in brief, "A civil injunction proceeding was commenced against Accredited; . . .", it was not the defendant herein, Sheriff McElveen, who brought or legally caused the suit. That was a civil action in which the district attorney, who actually filed the suit, was the proper plaintiff.
>
> Even if, in arguendo, it be considered that the Sheriff "legally caused" the suit to be filed, appel-

> lee's claim of malicious prosecution must fail for other necessary elements. The trial court denied Accredited's claim. The dismissal of a claim for malicious prosecution requires, among others, a factual determination of malice. . . . Our examination of the record supports no such finding herein.
>
> For these reasons, we affirm the trial court's dismissal of Accredited's claim under 42 USC §1983.[3]

Accredited filed an application for rehearing with the appellate court urging, *inter alia,* that the court had rendered its decision without taking into account numerous established facts of the case and certain legal arguments and recognized principles of law. The application for rehearing was denied.

Accredited then filed an application for a writ of certiorari with the Louisiana State Supreme Court, seeking a review of the lower courts' holdings on both its federal and state law claims. The application was denied.[4]

ARGUMENT

Accredited maintains that this Court should grant a writ of certiorari to correct the misapplication of 42 USC 1983 and 1988 in this case.

Louisiana sheriffs do not have any discretionary authority to refuse to accept a bail bond tendered by a lic-

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[3] Accredited Surety and Casualty Co., Inc. v. McElveen, 631 So.2d 563, 566-567 (La. App. 3 Cir. 1994), cert denied 637 So.2d 483 (La. 1994). The opinion is reproduced in the Appendix at p. 2a.

[4] Accredited Surety & Casualty Co., Inc. v. McElveen, 637 So.2d 483 (La. 1994). *See* Appendix at p. 1a.

ensed commercial surety. A licensed surety company has an absolute right to post bond for a criminal defendant unless the court has determined that the security for the bond is insufficient. La. C.Cr.P. arts. 321, 323; *State v. Armstrong,* 364 So.2d 558, 560-561 (La. 1978).

Louisiana sheriffs have no authority to enforce the payment of judgments which have not been made executory. La. C.Civ.P. art. 2291; *Moses v. American Security Bank of Ville Platte,* 222 So.2d 899 (La. App. 3 Cir. 1969).

Liability under 42 USC 1983 can extend to sheriffs and their deputies. *Taylor v. Gibson,* 529 F.2d 709 (5th Cir. 1971). A Louisiana sheriff can be held vicariously liable for violations of federal law by his deputy. *Thomas v. Frederick,* 766 F.Supp. 540 (W.D. La. 1991).

A private corporation has standing to bring an action under 42 USC 1983. *South Macomb Disposal v. Township of Washington,* 790 F.2d 500 (6th Cir. 1986).

To maintain a claim under 42 USC 1983 a plaintiff must show "both a deprivation of a constitutional right and the effectuation of the deprivation under color of state law." *Paul v. Davis,* 96 S.Ct. 1155, 1166-1167, 424 U.S. 693, 712 (1976).

A license to operate a business is a property right protected by the due process clause of the Fourteenth Amendment. *Baer v. City of Wauwatosa,* 716 F.2d 1117 (7th Cir. 1983).

A governmental entity cannot blacklist, whether by suspension or disbarment, someone it has been doing business with on an ongoing basis without giving the person notice and, under most circumstances, a hearing. *Transco Security, Inc. of Ohio v. Freeman,* 639 F.2d 318 (6th Cir. 1981), *cert. denied* 102 S.Ct. 101, 454 U.S. 820, 70 L.Ed.2d 90 (1991).

A sheriff was held liable under 42 USC 1983 for conspiring with plaintiff's competitor in a scheme to put plaintiff out of business. *A&A Concrete, Inc. v. White Mountain Apache Tribe,* 676 F.2d 1330 (9th Cir. 1982), *cert. denied* 106 S.Ct. 2008, 476 U.S. 1137, 90 L.Ed.2d 687 (1986).

Granting injunctive relief without notice and an opportunity to be heard is not favored in Louisiana. La. C.Civ.P. art. 3603, Comments (a) and (b).

The violation of state tort law is a basis for liability under 42 USC 1983. *Sanders v. English,* 950 F.2d 1152 (5th Cir. 1992); *Hand v. Gary,* 838 F.2d 1420 (5th Cir. 1988); *Shelton v. City of College Station,* 754 F.2d 1251 (5th Cir. 1985).

A sheriff is individually liable for the wrongful acts which he commits while acting in his official capacity. *Liberty Mutual Insurance Co. v. Grant Parish Sheriff's Department,* 350 So.2d 236, 239 (La. App. 3 Cir. 1977), *cert. denied* 352 So.2d 235 (La. 1977).

A sheriff is liable for attorney's fees under 42 USC 1988 for a violation of 42 USC 1983. *Jackson v. Galan,* 868 F.2d 165 (5th Cir. 1989).

The facts of this case establish that the Sheriff, independently, vicariously through his employees and in concert with other governmental officials, knowingly and intentionally exceeded his legal authority and violated state statutory law in preventing Accredited from engaging in a business for which it was duly licensed and qualified. The facts of this case also establish that the Sheriff was at all times acting under color of state law, as all of his actions and inactions were conducted by him as the Sheriff of Calcasieu Parish.

Knowing that the criminal district judge had refused to deny Accredited its right to post the bonds in question the day before, the Sheriff still refused to accept the bonds until that same judge could issue a civil restraining order against Accredited, without notice or hearing, at a time when it could take no protective action to insure the release of its principal on the bonds. The Sheriff, in fact, signed the verification of the petition for injunctive relief as the "Sheriff and Ex officio Tax Collector" for the parish and detained Accredited's representative, without explanation, until the petition and order could be delivered to the judge without Accredited's knowledge.

The Sheriff knew that Accredited was a licensed commercial surety and that no writs of *fieri facias* had been issued for the bond forfeiture judgments claimed to be due from Accredited.

The Sheriff admitted at the trial that he knew he did not have the authority to collect on the bond forfeiture judgments nor to refuse to accept the bonds without a court order to the contrary because, prior to the incident in question, a writ of mandamus had been issued to him by another surety company ordering him to reinstate one of its agents whom he had deleted from a list of local bondsmen because of the company's failure to pay certain bond forfeiture judgments.

The Sheriff's conduct proximately caused Accredited to lose $33,000.00 in bail bond premiums by depriving Accredited of the right and opportunity to post Anthony Brown's bonds in the course of its legitimate and authorized business pursuits.

Accredited has consistently urged its federal laws claims throughout the state court proceedings in this

case. None of the state courts, however, has chosen to address these claims within the context of prevailing federal authority applying 42 USC 1983. Accredited maintains that Sheriff McElveen acted to deprive Accredited of constitutionally protected property and liberty interests in conducting business under its state license and in transacting business with the State of Louisiana through the Sheriff's office without due process of law. Accredited further maintains that the Sheriff's actions amount to compensable violations of 42 USC 1983 under established federal case law and that the intentional nature of the Sheriff's actions entitle Accredited to recover reasonable attorney's fees under 42 USC 1988.

Respectfully submitted,

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August 18, 1994

APPENDIX A

MEMORANDUM DECISIONS

Cite as 637 So.2d (La. 1994)

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ACCREDITED SURETY AND CASUALTY INC.

v.

Wayne McELVEEN, Sheriff of Calcasieu Parish.

No. 94-C-0915.

Supreme Court of Louisiana.

May 20, 1994.

Prior report: La.App., 631 So.2d 563.

In re Accredited Surety & Cas. Co., Inc.; – Plaintiff(s); applying for writ of certiorari and/or review; to the Court of Appeal, Third Circuit, No. CA93-0678; Parish of Calcasieu, 14th Judicial District Court, Div. "H", No. 89-5538.

Denied.

DENNIS, J., not on panel.

APPENDIX B

ACCREDITED SURETY AND CASUALTY COMPANY, INC.,
Plaintiff-Appellee,

v.

Wayne McELVEEN, Sheriff of Calcasieu Parish, Defendant-Appellant.

No. 93-678.

Court of Appeal of Louisiana, Third Circuit.

Feb. 2, 1994.

Rehearing Denied March 11, 1994.

Writ Denied May 20, 1994.

Bail bond company brought action against sheriff for tortious interference with contract and violation of §1983 rights. The Fourteenth Judicial District Court, Parish of Calcasieu, Alcide J. Gray, J., entered judgment for company on tortious interference claim and dismissed §1983 claim. Both parties appealed. The Court of Appeal, Guidry, J., held that: (1) putative intervenor was not properly before Court of Appeal; (2) sheriff was not liable under §1983 to company for denial of due process as result of issuance of temporary restraining order (TRO) preventing company from writing bonds; and (3) sheriff did not tortiously interfere with contract between bail bond company and inmate.

Reversed and rendered.

Nancy Dunning, Byron P. Legendre, Lafayette, for Accredited Sur. and Cas. Co.

Michael Steven Beverung, Lake Charles, for Wayne F. McElveen, Sheriff for Calcasieu Parish.

Michael R. Garber, Lake Charles, for Sheral Lavergne.

Before GUIDRY and YELVERTON, JJ., and BERTRAND, J. Pro Tem.

GUIDRY, Judge.

Defendant, Wayne McElveen, Sheriff of Calcasieu Parish, appeals a judgment of the trial court awarding plaintiff, Accredited Surety and Casualty Company, Inc. (hereafter Accredited), damages in the sum of $33,000 plus interest for Sheriff McElveen's alleged tortious interference with a bail bond contract between Accredited and Anthony "Bo Dilly" Brown.

Accredited answered the appeal seeking reversal of the trial judge's dismissal of its claim under 42 USC §1983 and a remand for determination of damages under said statute. Sheral Lavergne, an intervenor whose claim against Sheriff McElveen was dismissed by the trial court as prescribed, answered McElveen's appeal seeking reversal of the trial court's judgment insofar as it dismissed her intervention.

ANSWER TO APPEAL OF SHERAL LAVERGNE

Ms. Lavergne is not properly before this court on appeal and hence the issue raised in her "answer to appeal" will not be considered.

La.C.C.P. art. 2121 states in part: "An appeal is taken by obtaining an order therefor, within the delay allowed,

from the court which rendered the judgment". We find neither an oral nor written motion for appeal by Ms. Lavergne in the record. As a panel of this court stated in *Davis v. Funderburk,* 274 So.2d 781 (La.App. 3rd Cir. 1973), "unless a party litigant obtains an order of appeal duly granted by the trial court, there can be no appeal". Nor does Ms. Lavergne find any relief under La.C.C.P. art. 2133. In this case, Ms. Lavergne is not an appellee. Her intervention was dismissed via an exception of prescription filed by Sheriff McElveen. The Sheriff did not seek review of this ruling. "One appealing party [here, Ms. Lavergne] cannot by answer to the appeal obtain an amendment of the judgment in his favor against another appealing party [here, the Sheriff]; an independent appeal is required for such relief". *Grant v. Ouachita National Bank,* 536 So.2d 647 (La. App. 2d Cir. 1988). Since Ms. Lavergne did not timely appeal the trial court's judgment dismissing her intervention, said judgment is now final. See also *Yount v. Maisano et al,* 616 So.2d 1382 (La.App. 5th Cir. 1993), writ denied, 620 So.2d 823 (La.1993).

FACTS

Early in 1988, defendant, Wayne McElveen, the Sheriff of Calcasieu Parish, noted that a number of insurance companies, licensed to post bail bonds in the parish, were delinquent in paying judgments which had ordered the forfeiture of numerous bonds. Inasmuch as he had made repeated written demand upon the companies for payment and was powerless to do more, he sought the assistance of the Calcasieu Parish District Attorney to enforce said judgments. The record reflects a letter from Sheriff McElveen, dated February 18, 1988, requesting help in collecting $182,415 in unpaid forfei-

tures. Some companies paid what was owed pursuant to the District Attorney's demands. Some, including Accredited, did not. More letters went from the Calcasieu Parish Sheriff's Office (CPSO) to the Calcasieu Parish District Attorney's Office (DA) with basically the same results being obtained. Such was the situation in November 1988.

On November 15, 1988, Anthony "Bo Dilly" Brown, an alleged major drug dealer, was arrested by the CPSO. Brown's bail was originally set at $500,000. One of Brown's associates and some members of his family immediately began contacting bail bonding firms to determine which one could handle Brown's bail. Among those contacted was Sheral Lavergne, an agent of Professional Bonding Service who wrote bail bonds for Accredited, the plaintiff herein. Additionally, Brown's attorney filed a motion for a bail reduction hearing.

A bail reduction hearing was held on Tuesday, November 22, 1988. Bail was set separately on each of the six charges on which Brown was arrested. The aggregate of the six bail fixings amounted to $330,000. That afternoon Ms. Lavergne and Steve Gennuso, an owner of Professional Bonding, Accredited's general agent in the state, attempted to post Brown's bond. They were informed that, because of the amount involved, the bond would have to be personally approved by Sheriff McElveen, but that the sheriff was out of the office attending his mother's funeral.

It was the next afternoon before Ms. Lavergne and Gennuso could get to see Sheriff McElveen. After reviewing the bail bond documents, Sheriff McElveen requested that Gennuso accompany him to Judge Gregory Lyons' chambers. At this meeting, Judge Lyons informed Gennuso that the District Attorney of Calcasieu Parish,

had filed a suit for preliminary injunction against Accredited seeking to have Accredited barred from writing any further bail bonds in Calcasieu Parish until its outstanding forfeitures were paid; he had granted a TRO restraining Accredited from writing any bonds; and, he had set Wednesday, November 30, 1988, as the hearing date on a rule for a preliminary injunction.

When the people who had been attempting to arrange Brown's bail bond learned of the foregoing action, they contacted Ira Pat Fuselier, a bail bond agent for Indiana Lumbermens Mutual Insurance Company whom they had consulted before settling on Accredited as their first choice, to arrange Brown's bail. Indiana Lumbermens was successful in arranging Brown's bail and earned the $33,000 premium which Accredited would have earned had it written Brown's bond.

Following the November 30, 1988 hearing in which a preliminary injunction was granted, Accredited paid the forfeited bonds under protest and attempted, untimely, to attack that judgment. Thereafter, Accredited filed the instant suit for damages contending the Sheriff tortiously interfered with its contract with Brown and/or the Sheriff violated its rights under 42 USC §1983. Accredited originally also sought damages for lost future income and damage to its reputation, but those demands were dropped by way of an amended petition, leaving only demands for damages in connection with the November 1988 incident.

In January 1991, Sheral Lavergne and Professional Bonding, Inc. filed petitions for intervention seeking damages they allegedly sustained as a result of the forgoing incident. In response to those demands, Sheriff McElveen filed exceptions of prescription which were

referred to the merits. After trial, the court maintained both exceptions. Professional Bonding did not attempt to appeal and, as we stated at the outset, Ms. Lavergne's attempt at appeal by answer is ineffective.

The trial court awarded Accredited damages in the sum of $33,000 for the Sheriff's tortious interference with its contract with Brown, but denied its civil rights claim under 42 USC §1983. The Sheriff appealed. Accredited answered the appeal contesting the trial court's dismissal of its §1983 action and the trial court's refusal to hold Sheriff McElveen *personally* liable for plaintiff's damages.

On appeal, defendant raises two issues: (1) the trial court erred in finding he tortiously interfered with Accredited's contractual relationship with Brown; and, in the alternative, (2) the trial court's fixing of damages as the gross premium on the bond rather than the net Accredited would have earned. Accredited answered also arguing two errors: (1) dismissing Accredited's civil rights claim under 42 USC §1983; and, (2) the trial court's failure to find Sheriff McElveen personally liable.

APPELLEE'S CLAIM UNDER 42 U.S.C. §1983

The basis of a §1983 action was discussed by a panel of this court in *Whitney v. Mallet,* 442 So.2d 1361 (La.App. 3rd Cir. 1983), writ denied, 445 So.2d 437 (La.1984), wherein we explained:

> Every person who, under color of state law, causes another to be deprived of any rights, privileges, or immunities secured by the Constitution and laws, is liable to the party injured in an action

at law, suit in equity, or other proper proceeding for redress. 42 U.S.C.A. §1983 . . . .

Acts of police officers who undertake to perform their official duties are included within the meaning of 42 U.S.C.A. Section 1983, whether they hew to the line of their authority or overstep it. *Screws v. United States,* 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945). It is the nature of the act performed, not the clothing of the actor or even the status of being on duty, or off duty, which determines whether the officer has acted under color of law. *Johnson v. Hackett,* 284 F.Supp. 933 (1968); *Robinson v. Davis,* 447 F.2d 753 (4th Cir. 1971).

To recover under §1983 a plaintiff must prove that his constitutional rights have been violated. *Davis v. Passman,* 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979). Some of a person's protected constitutional rights listed in *Davis,* supra, include the Fourth Amendment guarantee against unreasonable searches and seizures, and the Fifth Amendment guarantees that no person shall be deprived of life, liberty, or property without due process of and equal protection under the laws.

Plaintiff argues it has viable claims under §1983 for both denial of due process in the issuance of the TRO of November 23, 1988 and the instigation of malicious prosecution by the Sheriff. The TRO of November 23, 1988 was issued by a district court judge when, after examining the petition and supporting documents filed in suit number 88-5298 of the Fourteenth Judicial District Court, he was convinced there was a probability of irreparable harm had not the TRO been issued. The suit was filed by the District Attorney of Calcasieu Parish, the proper party to bring the suit, in the proper forum for a legitimate purpose.

Under La.C.Cr.P. art. 321 the sufficiency of security posted by a bail bond or surety company is within the discretion of the court having trial jurisdiction over the offense charged and such court may, on its own motion or on motion of the State, for good cause shown, order the clerk of court to refuse to accept appearance bonds written by such company. In the instant case, the District Attorney and the Judge of the Fourteenth Judicial District Court who issued the TRO were acting pursuant to and strictly in accordance with state law.

Although it may be that the suit for injunction was instituted by the District Attorney as a result of repeated requests by Sheriff McElveen for assistance in the collection of judgments ordering bond forfeitures and/or because of past experience, the Sheriff doubted that a bail bond issued by Accredited constituted sufficient security, the fact remains that the proceedings were instituted by the District Attorney and the TRO was issued by the Judge having jurisdiction over the offense charged, all strictly in accordance with La.C.Cr.P. art. 321. Sheriff McElveen had no authority to either institute or prosecute a proceeding under La.C.Cr.P. art. 321 and, under the circumstances, did not act "under color of state law" to deprive Accredited of any of its rights, privileges etc. secured by the Constitution. In sum, appellee has failed to show that it has been deprived of due process or equal protection of the law.

As to the claim of malicious prosecution, the elements of a federal claim of malicious prosecution under §1983 and the due process clause are generally the same as those under state tort law. *Thomas v. Frederick,* 766 F.Supp. 540 (W.D.La.1991); *Sanders v. English,* 950 F.2d 1152 (5th Cir. 1992). In *Owens v. Jackson,* 550 So.2d 359 (La.App. 3rd Cir.1989), this court stated:

The essential elements for a claim for malicious prosecution are:

1. The commencement or continuance of an original criminal or civil judicial proceeding;

2. Its legal causation by the present defendant in the original proceeding;

3. Its bona fide termination in favor of the present plaintiff;

4. The absence of probable cause for such proceeding;

5. The presence of malice therein; and

6. Damage conforming to legal standards resulting to plaintiff.

The Louisiana Supreme Court in *Miller v. East Baton Rouge Parish Sheriff's Department,* 511 So.2d 446 (La.1987), on remand, 522 So.2d 578, writ denied, 524 So.2d 520 (La.1988), gave us a more complete statement of element (2) of a claim for malicious prosecution: ". . . its legal causation by the present defendant against plaintiff who was defendant in the original proceeding . . .". The present defendant, Sheriff McElveeen, was not the plaintiff in the original suit, the district attorney was. While it is true, as plaintiff states in brief, "A civil injunction proceeding was commenced against Accredited; . . .", it was not the defendant herein. Sheriff McElveen, who brought or legally caused the suit. That was a civil action in which the district attorney, who actually filed the suit, was the proper plaintiff.

Even if, in arguendo, it be considered that the Sheriff "legally caused" the suit to be filed, appellee's claim of malicious prosecution must fail for other necessary elements. The trial court denied Accredited's claim. The dismissal of a claim for malicious prosecution

requires, among others, a factual determination of malice. Under the existing standards of appellate review as set forth in *Arceneaux v. Dominque,* 365 So.2d 1330 (La.1978); *Canter v. Koehring Co.,* 283 So.2d 716 (La.1973), and their progeny factual determinations of the trial court are reversible only if found to be manifestly erroneous or clearly wrong. Our examination of the record supports no such finding herein.

For these reasons, we affirm the trial court's dismissal of Accredited's claim under 42 USC §1983.

DEFENDANT'S APPEAL

Defendant raises two issues on appeal. As we find merit in the first issue raised, i.e., the trial court erred in finding he tortiously interfered with Accredited's contractual relationship with Brown, we will not address the second issue.

Accredited bases its claim of tortious interference with contract on the Sheriff's ongoing efforts to prompt the district attorney to collect a number of outstanding, forfeited bail bonds. Before the Sheriff began his letter writing campaign to the district attorney, he had tried to collect forfeited bonds by removing the names of bail bond agents who represented companies who had uncollected, outstanding forfeitures from the approved telephone list he kept posted in the jail. When this practice was ruled illegal in a suit by one of the affected bail bond agents, the Sheriff turned to the district attorney, who in accordance with La.R.S. 15:85 is the proper party to move for forfeiture of and to collect forfeited bail bonds. Plaintiff bases his claim of tortious interference on these actions by the Sheriff.

The history and current status in Louisiana of a cause of action based on interference with contract was, most recently, discussed in detail by our brethren of the Fifth Circuit in the case of *Colbert v. B.F. Carvin Construction Co.*, 600 So.2d 719 (La.App. 5th Cir.1992), writs denied, 604 So.2d 1309, 1311 (La.1992), wherein that court refused to expand an action based on interference with contract past that established by the Louisiana Supreme Court in *9 to 5 Fashions, Inc.*, infra. While the facts in *Colbert*, supra, bear no semblance to those herein, the issues raised are identical. In *Colbert*, supra, at 721, 722, the court stated:

> . . . [P]laintiffs . . . have pled intentional interference with contract and negligent interference with contract as causes of action . . .
>
> The threshold issue before this court is whether a cause of action exists in Louisiana for any of these theories.
>
> The Louisiana Supreme Court recognized "a corporate officer's duty to refrain from intentional and unjustified interference with the contractual relation between his employer and a third person." *9 to 5 Fashions, Inc. v. Spurney*, 538 So.2d 228 (La.1989) at 234. The *Spurney* court noted in dicta at 232-234:
>
> > Louisiana is now the only American state that does not recognize the action for tortious interference with contractual relations. [citations omitted].
>
> * * * * * *
>
> Moreover, a delictual rule such as *Kline v. Eubanks*[, 109 La. 241, 33 So. 211 (1902)] that flatly and without good reason deprives an innocent person of any remedy for damage to his con-

tract right caused intentionally and improperly by a corporate official is discordant with the fundamental civil law principle that obliges a person to repair damage caused another by his fault. La.Civ. Code art. 2315.

* * * * * *

Accordingly, our courts' previous expressions barring absolutely any action based on a tortious interference with a contract are annulled insofar as they conflict with this opinion. [citations omitted]. It is not our intention, however, to adopt whole and undigested the fully expanded common law doctrine of interference with contract, consisting of "a rather broad and undefined tort in which no specific conduct is proscribed and in which liability turns on the purpose for which the defendant acts, with the indistinct notion that the purposes must be considered improper in some undefined way." [citation omitted]. Some aspects of this tort have been subjected to serious criticisms, leaving open a good many questions about the bases of liability and defense, the types of contract or relationship to be protected, and the kinds of interference that will be actionable. [citations omitted].

The *Spurney* court specified it was only recognizing the duty owed by a "corporate officer" in this regard.

However, it is not so clear whether a broad remedy exists with regard to the tort of intentional interference of contract. The Fourth Circuit has declined to expand such a tort beyond the narrow confines of *Spurney*. *Tallo v. Stroh Brewery Co.*, 544 So.2d 452 (La.App. 4th Cir.1989), *writ denied*, 547 So.2d 355 (La.1989).

In his concurring opinion to *Tallo, supra,* Chief Judge Schott noted at 455:

> While the present case does not involve the same situation as the one in *9 to 5,* I am not convinced that the Supreme Court's recognition of a cause of action for tortious interference with contract is limited to the narrow situation presented in the case. However, if the cause of action is to be expanded I consider it to be the Supreme Court's function to do so and not ours as an intermediate appellate court.

The Fifth Circuit went on to note, citing *Great S.W. Fire Insurance v. CNA Insurance,* 557 So.2d 966 (La. 1990), that ". . . there is as yet no remedy in Louisiana for negligent interference with contract". See also *Frisard v. Eastover Bank for Savings,* 572 So.2d 343 (La. App. 5th Cir. 1990).

We, like our brethren of the Fourth and Fifth Circuits, refuse to expand a cause of action for tortious interference with contract beyond the narrow situation outlined in *9 to 5 Fashions, Inc.,* supra, at 234, wherein the court stated:

> [W]e recognize, as set forth particularly herein, only a corporate officer's duty to refrain from intentional and unjustified interference with the contractual relation between his employer and a third person.
>
> For purposes of analysis, the action against a corporate officer for intentional and unjustified interference with contractual relations may be divided into separate elements: (1) the existence of a contract or a legally protected interest between the plaintiff and the corporation; (2) the corporate officer's knowledge of the contract; (3) the officer's intentional inducement or causation of the corpora-

> tion to breach the contract or his intentional rendition of its performance impossible or more burdensome; (4) absence of justification on the part of the officer; (5) causation of damages to the plaintiff by the breach of contract or difficulty of its performance brought about by the officer.

(Emphasis ours).

Even if, in arguendo, we would be inclined to expand a tortious interference with contract cause of action beyond *9 to 5 Fashions, Inc.*, supra, we do not find the facts in this case to support any such action. Although the Sheriff's legitimate efforts, through the District Attorney, to enforce collection of forfeited bail bonds and to assure sufficiency of a bond to be issued in the Brown case, may have interfered with the ultimate confection of a contract between Accredited and Brown, such action can hardly be deemed negligent or tortious interference with contract. The action filed by the District Attorney pursuant to La.C.Cr.P. art. 321 was authorized under the circumstances. Once the court issued the TRO, the sheriff *could not* accept a bond from plaintiff.

Accordingly, for the reasons stated, the judgment of the district court is reversed and set aside and plaintiff's suit is ordered dismissed with prejudice and at its costs both at the trial level and on appeal except for such costs as were assessed against intervenors, Sheral Lavergne and Professional Bonding Service, Inc., at the trial level.

REVERSED AND RENDERED.

APPENDIX C

Excerpt of the Transcript of the Trial Held on March 15, 1993, in Accredited Surety and Casualty Company, Inc. vs. Wayne F. McElveeen, Sheriff of Calcasieu Parish Docket No. 89-5538; 14th JDC; Calcasieu Parish, Louisiana (N. Jody Lambert, CSR)

THE COURT: Mr. Book?

MR. BOOK: Your Honor, at this time, Sheriff McElveen and the Sheriff's Department, the defendants in this matter, would move for a directed verdict as to the suit against him, personally, and as to the 1983 matter, without going into great detail about the factual –

THE COURT: I don't think you need to. I think you're right. Gentlemen, I'm inclined to grant the defendant's request for directed verdict as to the Sheriff, individually. It is this Court's opinion that the Sheriff was in his official capacity. There is absolutely no evidence to the contraty, and there's absolutely no evidence as to the 1983 violations; however, there is evidence as to the tortious conduct, if any. So, I'm inclined to grant that, but I'll hear your arguments if you have any.

MR. BOOK: Your Honor, I would further move at this time for directed verdict as to the balance of the case because my appreciation under Louisiana law, there's no tortious interference with contract or business in this state. I don't know what negligent act they approved. I don't think the Sheriff calling the District Attorney to counsel on a bond of $330,000 is anyway a negligent act. I don't know of any act past that point that's been proven to this Court.

THE COURT: Yeah, but that's denied.

MR. RUNG: Your Honor, our argument as far as the 1983 claim for the record, it's that we feel like that we

have shown that there is intentional misconduct in this case. Particularly in light, that there's been admission that there was a writ of mandamus filed earlier against the Sheriff, and that he knew, and was aware, and apprised that he had no authority to refuse to accept the bond by a lawfully licensed surety company and by a lawfully licensed agent acting on their behalf. That action certainly shows that the Sheriff intentionally took this action and it certainly has been a violation of a Constitutional right on behalf of Accredited because they have the right to do business, and that is if a state agency or a state authority or a state actor deprives a person of their Constitutional right to do business, that actor has violated the Constitutional right, and it's as you say, if he was acting within his official capacity, then, he's under the power of state law, and that meets the second requirement of the 1983 claim.

THE COURT: I am extremely familiar with 1983 claims because I was one of the few lawyers in this parish who ever filed any; so, it's not nothing new. I'm going to grant the directed verdict as to the Sheriff, individually, and as to the 1983 claims themselves. Now, Mr. Book?

* * * * *

THE COURT: Well, I'm fixing to take some action on the intervenors. It doesn't matter because, number one, I think their claim prescribed; number two, I don't think you can limit your liability. I think that if the premium is owed, then, a premium is owed of $33,000, and a contractual relationship between Ms. LaVergne and between this gentleman and Accredited will stand. In other words, if they don't pay Sheral LaVergne, she's got a right to sue them – and she's got ten years to do so – and the same thing with this gentlemen, as far as Accredited – Professional Bonding – is it Professional Bonding?

THE WITNESS: The general agency is Professional Bonding.

THE COURT: Yeah, right. The money is owed to Accredited. Now, who they pay is their business, and there's no contractual relationship between the Sheriff and none of these people. They're bringing this action in tort; it is not in contract. That's my opinion.

MR. BOOK: And with all due respect, Your Honor, I would like to take a proffer at this time for the record.

THE COURT: Well, just tell me what you want to proffer.

MR. BOOK: I want to establish what percentage the plaintiff, Accredited, would have actually netted out of this commission – out of this premium.

* * * * *

. . . of a suit being filed by Accredited Surety & Casualty Company, Inc. against Wayne F. McElveen, Sheriff, in its capacity as Sheriff and invididually. The Court has let the Sheriff out individually, and it has, also, stated on a motion for directed verdict that the 1983 actions have no merit.

However, it is this Court's opinion that the actions of the Sheriff's Department regarding the denial of Accredited to bond Anthony Brown was improper. Additionally, this Court can honestly say that the TRO and preliminary injunction issued by another judge in this Court was improperly ordered. The TRO and the preliminary injunction should have never been ordered. Cormier versus Vidrine, I think, is the law; it came out of the Third Circuit in 1986. The Sheriff's Department was well aware of the fact that they – long before this – according to the Sheriff himself and according to Ms. Clausen who does that everyday, that they could not

terminate relationships, as far as insurance companies who were validly bonded with the state of Louisiana, to issue bonds without – the Sheriff couldn't do it. This would not have come about, of course, if the Sheriff would not have initiated this action with the District Attorney's Office.

This Court feels that the plaintiff has suffered loss in the amount of $33,000. Judgment against the Sheriff's Department in favor of Accredited Surety & Casualty Company for $33,000 plus legal interest from date of judicial demand is hereby ordered.

Anything else?

* * * * *

THE COURT: Yeah. Right. No problem. A judgment will be signed upon presentation.*

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*Transcript pp. 211-216, 221-222; Record, Louisiana Third Circuit Court of Appeal, Accredited Surety and Casualty Company, Inc. v. Wayne McElveen, Sheriff of Calcasieu Parish, Docket No. 93-678, pp. 459-464, 469-470.

APPENDIX D

14th JUDICIAL DISTRICT COURT
PARISH OF CALCASIEU
STATE OF LOUISIANA

Docket No. 89-5538

ACCREDITED SURETY AND
CASUALTY COMPANY, INC.

VS.

WAYNE F. McELVEEN,
SHERIFF FOR THE PARISH OF CALCASIEU

AMENDED JUDGMENT

This matter came for a trial on the merits on the 15th day of March, 1993.

Present: Kevin C. Rung, attorney for and Accredited Surety and Casualty Company, Inc. represented by Stephen Gennuso;

Nancy Dunning, attorney for and Professional Bonding Service, Inc., represented by Stephen Gennuso;

Michael Garber, attorney for and Sheral Lavergne;

Fred A. Book, Jr. and M. Steven Beverung, attorneys for and Wayne F. McElveen, Sheriff of Calcasieu Parish.

The Court, after considering the evidence presented, the testimony of the witnesses, and being of the opinion that the law and evidence are in favor of the plaintiff, Accredited Surety and Casualty Company, Inc., for the reasons orally assigned at trial:

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The defendant's Exception of Prescription against the plaintiff-interveners, Professional Bonding Service, Inc. and Sheral Lavergne, be and is hereby maintained, and the intervention of Professional Bonding Service, Inc. and Sheral Lavergne is dismissed with prejudice.

2. On Accredited Surety and Casualty Company, Inc.'s demand pursuant to 42 U.S.C. Section 1983 there be a Directed Verdict in favor of defendant Wayne F. McElveen, Sheriff of Calcasieu Parish, dismissing Accredited Surety and Casualty Company, Inc.'s claim pursuant to 42 U.S.C. Section 1983 with prejudice.

3. On Accredited Surety and Casualty Company, Inc.'s remaining demand, there be Judgment rendered in favor of Accredited Surety and Casualty Company, Inc., against the defendant, Wayne F. McElveen, Sheriff for the Parish of Calcasieu, in the sum of THIRTY THREE THOUSAND and 00/100 ($33,000.00) DOLLARS, together with legal interest from date of judicial demand until paid.

4. Costs of the intervention are assessed against plaintiff-interveners Professional Bonding Service, Inc. and Sheral Lavergne. All other costs are assessed against Wayne McElveen, Sheriff of Calcasieu Parish.

JUDGMENT READ AND SIGNED this 5th day of April, 1993, at LAKE CHARLES, LOUISIANA.

/s/ Alcide Gray
JUDGE

Approved as to form:

/s/ Kevin C. Rung
Kevin C. Rung
Attorney for Accredited Surety
and Casualty Company, Inc.

/s/ Fred A. Book, Jr.
Fred A. Book, Jr.
M. Steven Beverung, Attorneys for
Wayne F. McElveen, Sheriff for the
Parish of Calcasieu

/kcr/accrd.amd